

Stenehjem, Carlene R - DKC-7

From: on behalf of BPA Public Involvement
Subject: FW: comments on draft Tribal Monitoring Guidelines

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From: Lynne MacDonald [mailto:LMACDONALD@pn.usbr.gov]
Sent: Monday, May 01, 2006 5:00 PM
To: BPA Public Involvement; Shank, Bob - T-SPOKANE
Cc: Grimm, Lydia T - LC-7; Tromly, Stephen C - KEC-4
Subject: comments on draft Tribal Monitoring Guidelines

Bob,

Although the letter invites comment by tribal entities, I was forwarded the draft guidelines for review and comment by Lydia Grimm, with whom I work relating to legal issues affecting Reclamation, BPA, and the Corps of Engineers for implementation of the FCRPS historic properties ("cultural resources") management program. I appreciate the opportunity to comment on the draft guidelines. I have concerns I'd like to express concerning potential conflicts that could arise during implementation of this BPA draft guideline and the historic properties management program mandated under Section 106 of the National Historic Preservation Act (NHPA). I also believe some of the wording of the guidelines may cause confusion. I outline my concerns below.

1. The draft guidelines use a definition of "cultural resources" that is inconsistent with that defined in the NHPA. The guidelines seem to include natural resources ("traditional fisheries and wildlife") as cultural resources, yet these are not encompassed by NHPA as historic properties. It includes plants (subsistence and medicinal) that would only be encompassed by NHPA if they are contributing elements to an historic property (such as a traditional cultural property). In some places the guidelines imply that identification and protection of tribal "values" are an agency responsibility under NHPA. NHPA protects properties, whereas "values" are an intangible. The draft guidelines also fail to include an essential requirement of NHPA, which is that historic properties must be eligible to the National Register of Historic Places. For this they must be a physical property, with defined boundaries, exhibiting physical integrity, that meet one or more of the four criteria defined in regulation. Application of definitions that are inconsistent with those provided in law for historic properties will cause confusion and conflict when BPA attempts to implement a "cultural resources" commitment that uses alternative definitions. This will effect working relationships and program accomplishment both internally to BPA, between BPA and other agencies with whom they partner to implement programs such as FCRPS, and between the agencies and the tribes. It also is not within the purview of agencies to alter definitions of agency responsibility provided in law, which these guidelines appear to do.

I recommend that a clear definition be provided for "cultural resources," and that definition be the definition of "historic property" provided in the NHPA. I also recommend that you use the term "historic properties" rather than "cultural resources." This would reduce potential misinterpretation of exactly what constitutes the resource being addressed.

2. The title of the draft guidelines seems inconsistent with the actual meaning and purpose of said guidelines. It calls it "tribal monitoring," but then defines "monitoring" in such a way that it

includes the full array of NHPA Section 106 historic property management actions (that is, to identify, determine effects on, and manage historic properties). It is also inconsistent with the stated intent of the guidelines to define processes for contracting for services from tribes.

Use of the term "monitoring" is also confusing because, outside of these draft guidelines, it has very specific meaning that is significantly more limited than its meaning as used within the draft guidelines. This is likely to cause confusion.

I recommend that : (a) the title of the guidelines be changed to more accurately reflect their scope and intent, and (b) that the term "monitoring" not be applied to the scope of actions recommended for tribes within the guidelines.

3. Law and regulation already provide clear definition of the roles that tribes are to play in the processes agencies apply to manage historic properties (see implementing regulations for Section 106 of NHPA and for the Archaeological Resources Protection Act, and see Executive Order 13007 (Indian Sacred Sites)). Care should be taken to ensure that these draft guidelines do not change the balance of that mandated relationship. I believe that the statements outlined in the "Process" section, part I "NHPA consultation process," subparts 2 through 5, do change that balance. The clearest example of this shift is in section I.2.b and section I. 3, which define "consensus" between the tribal and BPA cultural resources staff as the expected outcome of consultations. NHPA and others are clear that the Agency Official makes decisions, made within the context of information and input from interested parties and when taking their information and concerns into account. Also, the processes outlined both to address lack of consensus or to document agreement are inconsistent with Section 106 and 36 CFR 800. However, because they are provided under a heading of "NHPA consultation processes" it is implied that the processes outlined originate in the regulations.

I recommend that the processes defined be revised to more correctly follow those provided in 36 CFR 800, taking care not to meaningfully alter the authority of the tribal staff or governments in the consultation process, the intended outcome of consultation, or the authority of the Agency Official to make the determination. I recommend that care be taken to make clear, by use of quotes and citations, when the process identified is from the regulations versus when it derives from BPA policy. I recommend that the following sections of the regulations be specifically quoted to ensure the full array of points at which tribes are involved are explicit. This will also make explicit the limits on their role. These sections are: 800.3(d) and 800.3(f)(2), which they define agency requirements to consult with tribes; 800.4(a)(3) and (4), which define tribal role related to defining APE and identifying properties; 800.4(c), 800.4(c)(2), and 800.4(d), which lay out the role of tribes and others in the evaluation process and the proper means for tribes to address disputes of agency determinations; 800.5(b) and 5(c), which define tribal role in finding of effect on historic properties; and 800.6(a), 6(b), and 6(c), which define processes to identify and document treatments of adverse effect.

4. I think, under "Processes" part I.1.a.i-iii, the three identification actions (literature review, surveys, tribal knowledge) present too narrow a view of the actions that are part of the Section 106 process. Identification is simply the first step.

I recommend that the three actions listed for identification be struck, and replaced with an summary of the full array of steps outlined in 36 CFR 800. This would be: (i) determination of the scope of identification efforts; (ii) identification of historic properties (including background research, consultation, oral history, field survey); (iii) evaluation of historic significance; (iv) assessment of adverse effect; and (v) resolution of adverse effect, as documented in a

Section 106 memorandum of agreement.

5. In the "Background" section, final paragraph, the guidelines outline the role and responsibilities of the BPA Tribal Affairs staff and the BPA Cultural Resource staff. I note that the role of the Cultural Resources staff appears to be very limited compared to the Tribal Affairs staff. The former is limited to simply providing technical expertise at the project team level, while the Tribal Affairs staff seem to be involved in policy meetings and providing briefing and issues identification and resolution, presumably to teams and also to tribal and agency managements. I note that in "Processes" part I.3., the Cultural Resource staff seem to be allowed no role in issue resolution. This is a particularly glaring omission, since the issue relates to determining "activities required under NHPA section 106."

I recommend that a BPA's senior archeologist be assigned an integral role in identifying and aiding BPA management in resolving issues related to compliance with NHPA, briefing management and others, and interacting with tribal managers and councils. Presentations by both the Tribal Affairs and the Cultural Resources staff can only aide in a more complete and accurate grasp by the ultimate decisionmakers of the complex issues.

6. "Processes" part II outlines contracting for "monitoring" work. It is somewhat difficult to clearly assess what is recommended because much of the process is defined by reference to the BPI. But several points raise concern. First, the opening sentence states that "the decision on whether BPA will contract for monitoring with the tribe rests solely with BPA." Although it most likely was not the intent, this would cut Reclamation from the decisionmaking processes when contractor selection is occurring for FCRPS contracts at Lake Roosevelt and Hungry Horse. This would violate the MOA between Reclamation and BPA for implementation of the joint program contracts at those locations.

I recommend that this statement be revised to avoid foreclosure of Reclamation in decisionmaking when BPA is letting contracts to meet joint program goals.

In "Processes" II.1., the factors outlined that contribute to BPA determining if a tribe will be the contractor seem to be directly influenced by the benefitting entity. In the ORCA meeting on contracting processes for FCRPS, the Contracting Officers from BPA, COE, and Reclamation were very clear that the benefitting parties should not be involved in the decisionmaking.

I recommend that this be revised to be consistent with guidance that will be forthcoming from the ORCA. I also recommend that the contracting guidelines recently prepared by the Corps of Engineers for FCRPS historic property program application be strongly mirrored in the BPA guidance in order to minimize divergence between the contracting guidance by the two agencies; this is important because of the joint programs on the FCRPS reservoirs. BPA and Reclamation legal and cultural resources technical staff were involved in review and comment on the COE guidance.

In reference to the same subsection, I recommend that guidance be offered about who is involved within BPA in making the assessment of risk, resource sensitivity, etc. As these are topics specific to NHPA, I recommend that the BPA Cultural Resources staff should be integral, if not have the lead, in making these assessments and recommendations to the project team and contracting officer.

Again, thank you for the opportunity to review and comment on the draft guidelines. I share the objective stated in the opening, to have consistent application and interpretation of processes. My concern is that the guidance as drafted actually would be inconsistent with law

driving the NHPA programs. That would undo the benefit gained. If you would like to discuss my comments or need clarification, please contact me at 208-378-5316 or at lmacdonald@pn.usbr.gov.

/s/ Lynne MacDonald
Regional Archeologist
Pacific Northwest Region
Bureau of Reclamation